Supreme Court, U. S.
FILED
OCT 15 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-128

FRANK CONSTANTINO,
Petitioner,

v.

STATE OF GEORGIA
Respondent.

On Petition for Writ of Certiorari to The Supreme Court of Georgia

BRIEF IN OPPOSITION FOR THE RESPONDENT

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

The State of Georgia, by and through the Attorney General for the State of Georgia, respectfully requests that this Court deny the petition for writ of certiorari, which seeks review of the Georgia Supreme Court's decision in this case. That opinion is reported as Constantino v. State, 243 Ga. 595, ___S.E.2d ___ (May 2, 1979), and has been attached as Appendix "A" to the petition for writ of certiorari.

QUESTION PRESENTED

Whether or not Ga. Code Ann. § 26-2610(e) and § 104-9901(b), which provide for criminal penalties for those who use the telephone for the purpose or annoying or harassing another, are in violation of the United States Constitution because of alleged indefiniteness or vagueness?

STATEMENT OF THE CASE

The Petitioner, Frank Constantino, and his wife, Patsy, were indicted by a Lowndes County, Georgia Grand Jury on twelve counts of the offense of using a telephone for the purpose of harassment. Specifically, the indictment charged the Petitioner with knowingly and wilfully telephoning one John Paul Jones and his wife, Jan Jones, repeatedly for the purpose of annoying, harassing and molesting them. Although the indictment did not specify the violation of a particular statute, it is clear that the alleged offenses could have occurred under either of two Georgia code sections.

Ga. Code Ann. § 26-2610 states, in pertinent part, as follows:

> "A person who commits any of the following acts is guilty of a misdemeanor: . . . (e) Telephones another repeatedly, whether or not conversation ensues, for the purpose of annoying, harassing or molesting another or his family, or uses over the telephone language threatening bodily harm . . ."

Ga. Code Ann. § 104-9901 also provides:

> "Whoever by means of telephone communication in this state: . . . (b) makes a telephone call, whether or not conversation ensues, without disclosing his identity and with intent to annoy,

> abuse, threaten or harass any person at the called number; or makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number . . . shall be guilty of a misdemeanor."

The evidence showed that the Petitioner had become involved with Mr. John Paul Jones when the Petitioner had asked him to investigate allegations against the Department of Family and Children Services which was attempting to take custody of the Petitioner's three children. Mr. Jones, a news reporter, investigated the allegations; however, he determined they were unfounded. Although the Constantinos continued to request that Mr. Jones further investigate their allegations, he refused to do so, and eventually the Constantino children were taken into custody by the Department of Family and Children Services. In November of 1977, Mr. Jones was called on to testify at a custody hearing, and the children were placed in a foster home.

Three days after the hearing Mr. and Mrs. Jones began receiving harassing telephone calls from the Petitioner and his wife. Testimony at trial from Mr. Jones and his wife established that prior to the custody hearing they had never received such phone calls, but they had received several hundred since that time. At times the Petitioner and his wife engaged in conversations with the Jones; however, when Mr. Jones threatened to record their voices if they refused to stop calling, the conversations ceased and a barrage of anonymous calls began where the caller would simply hang up without

speaking whenever the Jones answered their telephone. During a three hour period on one day Mrs. Jones counted fifty-four telephone calls.

A telephone "security trap" was placed on the Jones' telephone line on December 16, 1977. As a result of this "trap" it was determined that during a two day period, at least ten calls were received by the Jones from the Petitioner's telephone number. Thereafter, the Petitioner and his wife were indicted and convicted of twelve counts of using a telephone for the purpose of harassment. On appeal to the Supreme Court of Georgia and in his argument in this petition, Petitioner has contended that Ga. Code Ann. § 26-2610(e) and § 104-9901(b) are unconstitutionally vague and indefinite.

REASON FOR NOT GRANTING THE WRIT

SINCE GA. CODE ANN. § 26-2610(e) AND § 104-9901(b) GIVES SUFFICIENTLY DEFINITE WARNINGS AS TO THE CONDUCT PROSCRIBED THEREIN, AND SINCE SAID STATUTES ALSO REQUIRE A SPECIFIC INTENT BEFORE CRIMINAL LIABILITY ATTACHES, THEY ARE NEITHER UNCONSTITUTIONALLY VAGUE NOR INDEFINITE SO AS TO REQUIRE A REVERSAL OF THE PETITIONER'S CONVICTIONS.

The thrust of the Petitioner's application for a writ of certiorari is that the aforecited Georgia statutes allegedly provide no standards or guidelines to govern the court or jury in ascertaining what constitutes annoyance, harassment or molestation under said statutes. Petitioner argues that different juries may utilize different standards in determining what amounts to harassment, annoyance or molestation on the part of the accused.

However, an examination of Ga. Code Ann. § 26-2610(e) and § 104-9901(b) reveals that they both require the finder of fact to make a determination that the defendant had been engaged in a specific conduct with a specific intent at the time of the alleged offenses. Both statutes essentially call for punishment when an individual utilizes the telephone with the specific intent or purpose of annoying, abusing or harassing a person at the called number. These terms are well recognized and easily capable of definition. For example, Webster defines annoying as "causing vexation: irritating." Abuse is defined as "to attack in words: revile: to put to a wrong or improper use: to use so as to injure or damage: maltreat." Webster's New Collegiate

Dictionary, (1977). Likewise, the remaining terms of the proscribed conduct in the two statutes are easily definable and their meaning is readily ascertained by men of common intelligence.

It is clear that penal statutes must be sufficiently explicit to inform those who are subject to it, what conduct on their part will render them liable to its penalties. Connally v. General Const. Co., 269 U.S. 385, 389 (1925). However, as noted in Rose v. Locke, 423 U.S. 48, 49 (1975),

> "This prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness, for '[i]n most English words and phrases there lurk uncertainties. (cases cited) . . . All that due process requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden.'" Id. at p. 49-50.

In Rose this Court was concerned with a challenged Tennessee statute which contained a proscription of "crimes against nature." This Court found that the phrase "crimes against nature" was no more vague than many other terms used to describe criminal offenses at common law and now codified in many state and federal penal codes, and thus the constitutional attack failed.

The Georgia statutes in question are similar to statutes which have been approved by state courts in many other jurisdictions. See, e.g.

State v. Larsen, 37 Or. 425, 588 P.2d 41 (1978); People v. Lampasona, 130 Cal. Rptr. 682, 71 CA.3rd 884 (1977); People v. Smith, 392 N.Y.S.2d 968, 89 Misc.2d 789 (1977); Schuster v. State, 450 S.W.2d 616 (Tex. Cr. App. 1970); and Caldwell v. State, 26 Md. App. 94, 337 A.2d 476 (1975).

Likewise, the United States Congress has enacted similar legislation proscribing annoying, abusive, threatening or harassing telephone calls in the District of Columbia. 47 U.S.C. § 223 (1968). This code section has been examined by the Third Circuit Court of Appeals after it had been challenged on the grounds of being unconstitutionally vague. The Court in United States v. Lampley, 573 F.2d 783 (3rd Cir. 1978), found that the code sections specific intent requirement had rendered the appellant's constitutional challenge unconvincing. In upholding the statute that court stated:

> "[T]he Court, indeed has recognized that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid . . . . [W]here the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law. Screws v. United States, 325 U.S. 91, 101-02, 65 S.Ct. 1031, 1035, 89 L.Ed. 1495 (1945)." Id. at p. 787.

The State of Georgia recognizes that a criminal defendant may successfully assert unconstitutional vagueness as a defense where the proof shows that he could not have reasonably understood that his contemplated conduct was proscribed. United States v. National Dairy Products Corp., 372 U.S. 29, 32-33 (1963); Bowie v. City of Columbia, 378 U.S. 347 (1964); Lanzetta v. New Jersey, 306 U.S. 451 (1939). However in the instant case the Georgia Supreme Court correctly found that "[t]he plain meaning of the two statutes in question is that an individual may not make telephone calls for the purpose of harassing someone. The statutes are clear and could be readily understood by people of ordinary intelligence seeking to avoid their violation." Constantino v. State, supra, at p. 597. Thus, since the Georgia statutes provide sufficient warning and specifically as to their proscribed conduct, this Court should deny the instant petition for a writ of certiorari.

CONCLUSION

For all of the aforestated reasons, it is respectfully submitted that the petition for a writ of certiorari in the present case be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Walden, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing three copies of the same in the United States mail with adequate postage and properly addressed to:

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This 11th day of October, 1979.

JOHN C. WALDEN